NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA)
PUBLIC INFORMATION NOTICE — January 5, 2006
FINAL RULE — Coastal Zone Management Act Federal Consistency Regulations

WHAT ACTION NOAA TOOK

On January 5, 2006, NOAA published in the *Federal Register* a Final Rule revising certain sections of NOAA's Coastal Zone Management Act (CZMA) federal consistency regulations.
See 71 Fed. Reg. 787-831 (January 5, 2006).

State CZMA programs balance protection of coastal resources with development, recreation, fishing, energy, and other uses of the coastal zone. Once NOAA approves a State program, the State receives two primary benefits: (1) annual federal implementation grants, and (2) federal consistency authority. NOAA has approved 34 of 35 eligible coastal States; Illinois is considering participation.

Federal consistency is the key to the CZMA emphasis on States' rights, providing for the primacy of State decisions regarding coastal uses and resources. Once a State's management program is approved by the Secretary of Commerce, Federal consistency requires that any action proposed by a Federal agency that will have a reasonably foreseeable effect on any land or water use or natural resource of a State's coastal zone must be consistent to the maximum extent practicable with the enforceable policies of States' federally approved CZMA programs. 16 USC § 1456(c)(1). Additionally, the following activities must be fully consistent with state enforceable policies: (1) activities proposed by non-federal applicants for federal licenses or permits; and (2) state agencies or local governments applying for federal funds. NOAA's federal consistency regulations are found at 15 CFR part 930.

NOAA's Office of Ocean and Coastal Resource Management (OCRM) administers the CZMA on behalf of the Secretary of Commerce, approves and oversees State CZMA programs, issues CZMA grants, and provides technical and management assistance and mediation support to CZMA stakeholders. OCRM's federal consistency web page is:
http://coastalmanagement.noaa.gov/czm/federal_consistency.html

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WHAT THE FINAL RULE DOES *NOT* DO

The Final Rule does not weaken the CZMA consistency provision. Rather, the Final Rule contains a strong package of improvements to the CZMA federal consistency regulations. NOAA fully supports the objectives of the CZMA and the authority granted to States under federal consistency and believes that the Final Rule continues to balance the state-federal-private interests embodied in the CZMA and addresses issues that have delayed CZMA reauthorization. The regulations also provide for more efficient approval of both energy and non-energy projects by providing greater clarity, transparency and predictability in the regulatory process. The Final Rule fully maintains the authority of coastal states to review proposed federal actions that have reasonably foreseeable effects on a state's coastal uses or resources, as provided for in the CZMA and NOAA's implementing regulations, as revised in 2000.

WHY NOAA REVISED THE EXISTING REGULATIONS

1. The National Energy Policy Development Group's Report (May 2001) (Energy Report), recommended that the Department of Commerce and the Department of the Interior determine if changes were needed to their programs to address procedural time frames, information needs, and whether other procedural efficiencies could be achieved through regulation.

2. Issues regarding information needs for federal consistency review, deadlines for the Secretary's decision in federal consistency appeals, and determining when some types of federal actions are subject to federal consistency review warranted amendments that improve NOAA's regulations.

3. On August 8, 2005, the President signed the *Energy Policy Act of 2005* (Pub. L. No. 109-58). The Energy Policy Act mandated certain deadlines for CZMA appeals, and specified that the initial record to be used for CZMA appeals of energy projects is the record consolidated by the lead Federal permitting agency.

WHAT THE STEPS WERE IN THE RULEMAKING PROCESS

1. July 2, 2002. NOAA published an Advanced Notice of Proposed Rulemaking (ANPR) in the *Federal Register*, 67 Fed. Reg. 44407-44410 (July 2, 2002), asking the public whether changes should be made to the regulations in six general areas.

2. June 11, 2003. NOAA published a proposed rule in the *Federal Register*, 68 Fed. Reg. 34851-34874 (June 11, 2003). Comments were due August 25, 2003. The 3,066 comments were submitted and can be viewed at OCRM's federal consistency web page.

3. June 2004. NOAA withdrew its Draft Final Rule from the Office of Management and Budget (OMB). NOAA withdrew the rule from the OMB intergovernmental review process to benefit from the forthcoming Ocean Commission Report. NOAA believed that it would be premature to issue a Final Rule before the Ocean Commission had a chance to review and address comments from the Governors on the draft Ocean Commission Report. The final Ocean Commission Report noted the offshore energy issues raised in the Energy Report and that NOAA had issued a proposed rule that would address those issues. The Ocean Commission Report did not make any substantive comments on NOAA's rulemaking.

4. January 2005. Following issuance of the Ocean Commission Report in late 2004, NOAA reinitiated the OMB intergovernmental review process in order to publish the Final Rule.

5. January 5, 2006. In response to the Energy Report and public comments on the proposed rule, and consistent with the Energy Policy Act of 2005, NOAA published a Final Rule in the *Federal Register*, 71 Fed. Reg. 787-831 (January 5, 2006). The Final Rule takes effect on February 6, 2006. The Final Rule and this Public Information Notice will be posted on OCRM's federal consistency web page.

SECTION-BY-SECTION SYNOPSIS of the amendments made to the regulations as published in the *Federal Register*: 71 Fed. Reg. 787-831 (January 5, 2006).

Rule Changes 1 (§ 930.1(b) and (c)), 2 (§ 930.10), and 3 (§ 930.11(g)). These include minor technical corrections to the 2000 rule, and provide additional context regarding the overall objectives of the federal consistency regulations. A minor change from the proposed rule was made to § 930.1(c) to encourage States to participate in the administrative processes of federal agencies.

Rule Change 4: § 930.31(a) Federal agency activity. The changes do not alter the current application of the definition of Federal agency activity, but clarify NOAA's long-standing view that a "function" by a Federal agency refers to a *proposal for action* that has reasonably foreseeable coastal effects, and not to all tasks, ministerial activities, meetings, discussions, exchanges of views, and interim or preliminary activities incidental or related to a proposed action. This change does *not* affect the application of the CZMA "effects test." Congress amended the CZMA in 1990 to make it clear that no federal actions are categorically exempt from federal consistency and that the determination of whether consistency applies is a case-by-case analysis of whether a Federal agency activity will have reasonably foreseeable effects on any coastal use or resource. The Final Rule makes minor grammatical changes from the proposed rule.

Rule Change 5: § 930.31(d) Federal agency activity - General Permits. NOAA removed the option allowing Federal agencies to treat their general permits as a federal license or permit activity. If a general permit is proposed by a Federal agency and coastal effects are reasonably foreseeable, then the general permit is a Federal agency activity under CZMA § 307(c)(1) and 15 CFR part 930, subpart C. Treating a general permit as a federal license or permit activity conflicted with other aspects of NOAA's regulations. Minor editorial changes were made from the proposed rule.

Rule Change 6: § 930.35(d) General negative determination. The general negative determination is an administrative convenience when Federal agencies undertake repetitive activities that, either on an individual, case-by-case basis or cumulatively, *do not* have coastal effects. This does not affect the requirement for Federal agencies to provide consistency determinations to States when there are reasonably foreseeable coastal effects. A minor editorial change was made from the proposed rule.

Rule Change 7: § 930.37 Consistency determinations and National Environmental Policy Act (NEPA) requirements. The change clarifies information needs related to NEPA documents by providing greater specificity regarding NOAA's long-standing interpretation of the distinction between NEPA and CZMA requirements. Federal agencies are required to submit information to support a consistency determination, pursuant to the requirements in § 930.39, and may do so in any manner they choose. Thus, even though a Federal agency may provide a NEPA document to support its consistency determination, States cannot require Federal agencies to do so. A change was made from the proposed rule to make this more explicit.

Rule Change 8: § 930.41(a) State agency response. This change clarifies when the State's consistency review period begins for Federal agency activities, and clarifies that the State's determination of whether the information provided by the Federal agency is complete is not a substantive review. The initial review is a "checklist" review by the state to determine whether the description of the activity, the coastal effects, and the evaluation of the State's enforceable policies are included in the submission to the State. If the items required by § 930.39(a) are included, then the 60-day review period begins. The State's substantive review occurs during the 60-day review period. A minor editorial change was made from the proposed rule.

Rule Change 9: § 930.51(a) Federal license or permit. The changes clarify NOAA's long-standing view that a "federal license or permit" is any federal authorization that: (1) is required by federal law, (2) authorizes an activity, (3) the activity authorized has reasonably foreseeable coastal effects, and (4) the authorization is not incidental to a federal license or permit previously reviewed by the State. An editorial change was made from the proposed rule.

Rule Change 10: § 930.51(e) Substantially different coastal effects. The change clarifies that the Federal agency makes the determination of whether there have been substantially different coastal effects to a previously reviewed license or permit activity, after consulting with the State and applicant. If a State disagrees with a Federal agency's determination, the State can request NOAA mediation or seek judicial review to resolve the factual dispute. An editorial change was made from the proposed rule.

Rule Change 11: § 930.58(a)(1) Necessary data and information. This change provides greater specificity as to those information requirements associated with review of federal license or permit activities, resulting in a more predictable and transparent process. The purpose of § 930.58 is to identify the information needed to *start* the six-month consistency review period and, to the extent possible, identify the information needed by the State agency to make its concurrence or objection. A change was made from the proposed rule to emphasize that the applicant provides to the State agency all material "relevant to a State's management program" provided to the Federal agency.

Rule Change 12: § 930.58(a)(2) Necessary data and information (State permits). NOAA removed "State permits" as eligible necessary data and information requirements, but has retained "completed State permit applications." Otherwise, requiring applicants to obtain State permit approval before the six-month consistency review period could result in a State having to determine consistency with enforceable policies *before* the six-month review period even begins, thus potentially defeating the purpose of the statutory time frames in the CZMA. In addition, public comment on federal consistency reviews could be rendered moot because State approvals would already have been issued. If the State permit is not issued during the six-month review period, the applicant and the State could agree, pursuant to § 930.60, to stay the six-month period until a specific date to allow for issuance of the State permit. A State, at the end of the six-month review period, may object if the applicant has not yet received the State permit. The Final Rule also clarifies that NEPA documents listed as necessary data and information pursuant to § 930.58(a)(2), will not be considered necessary data and information when a Federal statute requires a Federal agency to initiate CZMA review prior to its completion of NEPA compliance.

Rule Change 13: § 930.60 Commencement of State agency review. These changes clarify when the State's six-month review period begins for federal license or permit activities. The State's determination of whether the information provided by the applicant pursuant to 15 CFR § 930.58 is complete is not a substantive review. Rather, the initial review is a "checklist" review by the state to determine whether the information required by § 930.58 are included in the submission to the State agency. If the items required by § 930.58 are included, then the six-month review period starts on the date the State received the consistency certification and necessary data and information. The State's substantive review occurs during the six-month review period. Also, in order to stay the six-month review period once it begins, the rule now requires that the applicant and State agree in writing to stay the review period for a specific amount of time with a definitive end date. If a State wants to require specific information in addition to that described in § 930.58(a) *prior to starting the six-month review period*, the only way the State can do so is to amend its management program to identify specific "necessary data and information" pursuant to § 930.58(a)(2). This is not a new requirement, but was required in the 1979 rule and clarified in the 2000 rule. The changes also clarify that a consistency certification is necessary to start the six-month review period. Clarifying editorial changes were needed from the proposed rule, with no change in meaning.

Rule Change 14 (§ 930.63(d)). This is a minor technical correction to the 2000 rule.

Rule Change 15: § 930.76(a) and (b) Submission of an OCS plan, necessary data and information and consistency certification. The changes provide a more specific list of the information required for OCS plans. There is a minor correction from the proposed rule. The term "confidential" is added at the end of § 930.76(b), because the phrase used throughout the regulations is "confidential and proprietary information," not just "proprietary information."

Rule Change 16: § 930.77(a) Commencement of State agency review and public notice. This change clarifies when the State's consistency review period begins for OCS plans. This mirrors the change to §§ 930.41(a) and 930.60, including when a State may require information in addition to that described in § 930.76, prior to starting the six-month review. If the information required by § 930.76 are included, then the six-month review starts when the State receives those items. The State's substantive review occurs during the six-month review period. This section also provides that if a State requests additional information after the six-month review period begins, such a request must be made within the first three months of the six-month review period. A change is made, however, from the proposed rule so that, if after the three-month period, new activities or coastal effects not previously described in an OCS plan and for which information was not provided become part of the OCS plan, then the State may request additional information on the new activities after the three-month period. This is necessary so a State can request information after the three-month period when the activity is changed and information regarding the change is not provided to the State. Minor editorial changes were made from the proposed rule.

Rule Change 17: § 930.82 Amended OCS plans. To be consistent with § 930.76(c), this minor change clarifies that it is the Department of the Interior, not the person, that submits the consistency certification and information to the State for amended OCS plans. There is a minor correction from the proposed rule by adding the term "confidential" at the end of § 930.82. *See* rule change15, above.

Rule Change 18: § 930.85 Failure to comply substantially with an approved OCS plan. NOAA makes this change to more closely coordinate CZMA and OCSLA requirements, and to be consistent with CZMA section 307(c)(3)(B). Under NOAA's regulations and the OCSLA program, it is MMS that determines whether a change to an OCS plan is "significant" and thus, whether the change requires CZMA federal consistency review. MMS should also make this determination when a person fails to substantially comply with an approved OCS plan, especially since the CZMA does not authorize NOAA to make such determinations. Also, to be consistent with § 930.76(c), this change clarifies that it is the Department of the Interior, not the person, that submits the consistency certification and information to the State for OCS plans. Minor grammatical changes were made from the proposed rule.

Rule Change 19: § 930.121(c) Alternatives on appeal. This change makes it clear that the Secretary does not substitute his judgment for that of the State in determining whether an alternative is consistent with the enforceable policies of the State management program. This is not a change in standards or practice, only a clarification. Thus, no alternative will be considered by the Secretary as "reasonable" or "available" unless the State submits a written statement that the alternative will allow the activity to be conducted in a manner consistent with the enforceable policies of its management program. The Secretarial appeals process does not review whether the proposed activity is consistent with the State's enforceable policies. It is a *de novo* consideration of whether a proposed activity is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security. Likewise, the Secretary relies on the State to determine whether an alternative would allow the project to proceed in a manner consistent with the enforceable policies of the management program. If a State determines an alternative is consistent with its CZMA program and the Secretary does not override the State's objection, then the applicant may pursue the identified alternative approved by the State without further CZMA

review by the State. If a State determines that there is no alternative that is consistent with its CZMA program, then the State would not prevail on the alternative element on appeal. A minor editorial change was made from the proposed rule.

Rule Change 20 (§ 930.123) Definitions. NOAA added definitions, for "energy project," "consolidated record," and "lead Federal permitting agency." These definitions were added after the proposed rule was published and are needed to make the rule consistent with the Energy Policy Act of 2005 (Pub. L. No. 109-58). "Consolidated record" is taken directly from the Energy Policy Act and "energy project" is broadly defined to capture facilities that explore, develop, produce, transmit or transport energy or energy resources. "Lead Federal permitting agency" is taken from the Energy Policy Act and means the Federal agency required to issue authorizations under the various energy-related statutes.

Rule Changes 21 (§ 930.125), 22 (§ 930.127), 23 (§ 930.128), 24 (§ 930.129) and 25 (§ 930.130) Processing appeals to the Secretary. The Energy Policy Act of 2005 mandated specific deadlines for processing CZMA appeals. Therefore, the deadlines contained in the proposed rule have been amended to comport with these new statutory requirements. These new deadlines are summarized in the following table.

General Coastal Zone Management Act Federal Consistency Appeal Procedures Required by the Energy Policy Act of 2005 and NOAA Regulations
(*See* 15 CFR part 930, subpart H for further details)

Day(s) After Receipt of Notice of Appeal	Action Required
0	• Notice of Appeal received
30	• Publish Federal Register (FR) Notice of Appeal and newspaper notices. Notice *must* be published by day 30. • Public Comment Period and Federal Agency Comment Period opens. • Receipt of Appellant's Brief and Appendix.
60	• Receipt of State's Brief and Supplemental Appendix. • Public and Federal Agency Comment periods close unless Public Hearing Request granted. • Request for Public Hearing must be received (within 30 days of FR Notice).
80	• Receipt of Appellant's Reply Brief.

60-Day Stay Granted		No Stay Granted	
250	• Publish Notice closing Record; Record *must* be closed on day 250	190	• Day 190 is end of 160-day decision record period without stay. • Publish Notice closing Record.
310	• Secretary issues Decision or publishes FR Notice re: No Decision–take additional 15 days.	250	• Secretary issues Decision or publishes FR Notice re: No Decision – take additional 15 days.
325	• Secretary issues Decision	265	• Secretary issues Decision

The provisions in § 930.130 now follow the requirements of the Energy Policy Act. The section now provides that, in appeals filed from State objections under 15 CFR part 930, subparts D, E and F, the Secretary shall close the decision record no later than 160 days after publishing notice of the appeal in the Federal Register. The Secretary may stay the 160-day period for one period not to exceed 60 days: (1) if the parties mutually agree to stay the 160-day period or, (2) to ensure that the Secretary has any supplemental information specifically requested by the Secretary to complete a consistency review under the CZMA, or any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency. NOAA, in the proposed rule, made changes in subpart H to accommodate the new deadlines for processing appeals. In the Final Rule, NOAA modified these changes further so that NOAA could complete processing appeals under the shorter deadlines mandated by the Energy Policy Act. These changes are briefly described below.

Under § 930.125, NOAA has retained the requirement in the proposed rule that the appellant's initial notice of appeal must identify *all* arguments it will raise in the appeal (in essence it will be an outline of the appellant's brief). NOAA also changed the deadline to submit the appeal fee if NOAA denies a fee waiver request from 20 to 10 days.

Under § 930.127, NOAA has retained the requirement from the proposed rule that appellant's brief is due within 30 days of the filing of the notice of appeal and that the State's brief is due 60 days after the appellant's filing of the notice of appeal. In keeping with standard appellate procedure, NOAA is allowing the appellant to submit a reply brief to the State agency's brief. NOAA also established page limits for all briefs and encourages use of a common appendix that all parties shall use to cite to documents in the decision record. NOAA has added a new § 930.127(i) to comply with the Energy Policy Act requirement that NOAA use the "consolidated record" maintained by the lead Federal permitting agency for appeals of energy projects. In order to meet the new decision deadlines, the appellant must submit the consolidated record with its notice of appeal. NOAA has also included a provision that the Secretary may extend the time for filing a notice of appeal to give an appellant time to gather the consolidated record.

For appeals involving energy projects, the Energy Policy Act limits NOAA's decision record to the consolidated record. NOAA may supplement the record only as described above. Therefore, to comply with the Energy Policy Act, no other information will be accepted by NOAA to process appeals involving energy projects, including public and Federal agency comments. Therefore, the public and Federal agencies need to provide all CZMA related comments through the lead Federal permitting agency's and State CZMA agency's review processes.

Rule Change 26: §§ 930.46(a)(3), 930.66(a)(3), 930.101(a)(3) Supplemental coordination for proposed activities. The changes to these sections were not in the proposed rule. However, these changes are needed to clarify the commencement of State review periods and information needs, which was a primary issue addressed in the proposed rule. This change recognizes the fact that if a State concurs or concurrence is presumed, the concurrence is valid only for those activities and effects described by the Federal agency, applicant or applicant agency, as set forth in information submitted to the State *during* the State's review. Therefore, this change addresses the problem where a State concurs, the project was substantially changed during the State's review period, but the State was not privy to the change. This change also reflects the importance of ensuring that the State is provided with timely notice of project changes during the State's review period. This change does not apply to subpart E, because amended OCS plans are already covered under § 930.82.